

Sneller Verbatim/MLS

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J 3039/02

2002-07-26

In the matter between

NATIONAL UNION OF MINEWORKERS

Applicant

and

1ST Respondent

JOHANNESBURG 2ND Respondent

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J U D G M E N T

DELIVERED ON 31 JULY 2002

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REVELAS J:

1. This was an urgent application, its main objective being to prevent the operation of a written execution issued on 8 July 2002 and in terms of which the first respondent, to whom I shall refer to as Maseko, through his attorneys of record had instructed the deputy-sheriff to execute against the applicant for the

latter's non-payment of the amount of R85 000.

2. The deputy-sheriff is the second respondent in this matter and no relief is sought against him.
1. 1.3. The amount of R85 000, according to Maseko, is payable by the applicant, the National Union of Mine Workers or the Union to him in terms of an agreement of settlement which was made an order of this court on 14 June 2002.
4. The first respondent raised two points *in limine* in respect of the urgent application, namely that the deponent to the founding affidavit did not have the necessary *locus standi* to depose to the founding affidavit.
5. However, this point abandoned during argument by the attorney appearing on behalf of Maseko.
6. The second objection raised was that the matter was not urgent *inter alia*, because there were no prayers specifically requesting the court to regard the matter as urgent as per the usual practice in a Notice of Motion of this kind. The applicant has, however, made sufficient allegations and submissions in its founding affidavit to foreshadow such a prayer. To argue that the application should be dismissed on that ground would suggest an overly technical approach which is untenable.

7. The urgency of the matter had to be determined on all the facts of the matter, which brings me to the merits.

It is necessary to set out briefly the background of the facts which gave rise to this matter.

8. Maseko was dismissed by the union and reinstated by an arbitrator acting under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), to whom he referred a dispute about an unfair dismissal which could not be resolved between the parties and the dispute was arbitrated.

1. 9. The arbitrator determined that the applicant should pay Maseko the sum of R52 680, being an amount equal to the remuneration he would have received had it not been for the dismissal, up to the date of the award.

10. On 13 February 2002 the applicant received a directive from the South African Revenue Services, indicating to the applicant as the respondent was obliged to deduct employee's tax from the sum awarded by the CCMA and gave the sum of R52 680.

11. This sum was deducted from the amount awarded and on 18 February 2002 the applicant paid the respondent the sum of R34 944,12 in satisfaction of the award, having deducted the sum prescribed in the directive from the SARS. The applicant banked this cheque.

12. Subsequently a dispute arose between the parties as to

a sum payable for the period between the date of the award and the finalisation of the unsuccessful review application.

13. When this dispute was not resolved the first respondent, Mr Maseko, launched an application in the Labour Court under case number J 1027/02 on 19 March 2002. The applicant applied to make the arbitrator's award an order of court and an order for the payment of R127 755,87 in respect of remuneration which Maseko stated he ought to have received between the date of the arbitration award and the date on which the application for review was refused by the Labour Court.

1. 14. The parties then entered into a settlement agreement with regard to the application which was set down for hearing before the Labour Court on 14 June 2002. It was agreed that the agreement be made an order of court. The memorandum of the agreement was part of the papers. According to the memorandum, the dispute between the parties was settled on a final basis and the applicant undertook to pay the respondent the sum of R85 000,00 and the settlement agreement was made an order of court.

15. Maseko's attorneys of record then contacted the union and he was advised that in accordance with union policy and following the procedure which was adopted

previously (to the award of R52 680), it again applied to the South African Revenue Services for a directive in relation to whether income tax was payable on the agreed sum of R85 000 or not.

16. Maseko's attorneys adopted the approach that a tax directive or requesting a tax directive would amount to a repudiation of the settlement agreement.
17. A tax directive was then received on 8 July 2002 wherein the union was required to deduct a sum of R25 224 from the lump sum payment of R85 000 as employee tax.
18. The union then requisitioned a cheque in the sum of R59 776 reflecting such a deduction as required by the South African Revenue Services and the cheque was forwarded to the applicant's attorneys.
1. 19. On 19 July 2002 Maseko's attorney delivered a letter to the union's attorney returning the cheque and requiring a cheque in the full amount of R85 000 drawn in their favour.
20. At this stage I must mention that the agreement of settlement reflected that the amount in question, that is the R85 000, should be paid to Maseko's attorneys of record. The cheque was for R59 776,00, however, made out to Maseko personally.
21. The letter written to the union's attorney referred to

the fact that a warrant of execution had been issued and that it intended to instruct the Sheriff to execute the warrant should there be any further delay in the payment of the amount of R85 000.

22. The *City Press* of 21 July 2002 also reported that the Sheriff had reported to attach the applicant's bank account in satisfaction of the writ issued in respect of this matter. It emerged that the union did not have enough funds in its bank account to be attached.

23. The written execution which was issued on 8 July 2002 appears to be in terms of Section 163 of the Labour Relations Act 66 of 1995, the Act.

24. The union contended that the writ is unlawful since it had complied with its obligations in terms of the court order (i.e. the agreement of settlement which was made an order of court) in that the correct amount was paid to Maseko and that the amount need not have been paid to the attorney as a requirement of satisfaction of that court order.

1. 25. According to the provisions of the Income Tax Act 58 of 1962 the applicant has an obligation to deduct or withhold the payment of remuneration to an employee unless the commission of the South African Revenue Services has indicated to employ the contrary.

26. "Remuneration" in the Income Tax Act includes gross

income and gross income and is defined by Section 1(d) of the Income Tax Act as including any amount including any voluntary award received or accrued in respect of determination, loss, cancellation or deviation of any employment.

27. It is clear that under the Act remuneration is used to calculate compensation and compensation is essentially what was awarded to Maseko by the arbitrator and what was owed and due to him following the period between the unsuccessful review and payment in terms of the award where no payment was made to him. It is calculated on exactly the same basis.

28. In my view, such an amount does not constitute damages or any other amount and is therefore subject to the provisions of Section 1(d) of the Income Tax Act.

29. In my view this matter is on all fours with the Labour Court decision in *Barnard v Shelard Media (Pty) Limited* 2000 21 ILG 2248 wherein Mohlalegi AJ relied on the judgment of Landman J in *Eckhard v Fulpro Industrial Filters (Pty) Limited and Others* (1999) 20 ILJ 2043 (LC). It was held:

1. **"Generally a payment accrued in respect of termination of employment constitutes income in terms of a definition of gross income in terms of Section 1 of the Income Tax Act 58 of 1962. The Act places a duty on the employer to obtain a**

direction regarding the employee's liability and to deduct this from the payment due to the employee."

30. The judge held that an unexpressed term relating to reduction of tax imported into a settlement agreement of the nature as the one in the application before me by schedule 4 of the Income Tax Act.
31. Generally, in cases of this nature the provisions of the Income Tax Act would nullify any attempt by the parties to exclude in their agreements tax obligations.
32. Accordingly the judge found that the settlement amount of R65 000 in that matter constituted gross income in the hands of the respondent's employee and the applicant was obliged in law to effect the tax deduction.
33. I respect of the amount payable to Maseko, the union was not obliged to pay him R85 000,00 the amount of the cheque which was forwarded to Maseko on the basis that he was liable for tax.
34. The second question is whether or not the union is obliged in terms of the agreement to pay the attorneys instead of Maseko. Maseko's attorneys of record were not third parties to the agreement. They were acting as agents to a principal.
1. 35. The object of the agreement was to pay Maseko.

He was to be compensated and not the attorneys of record. Therefore it is not for the attorneys of record to insist that the agreement was breached because the cheque was not made out to them.

36. The underlying indebtedness reflected in the settlement agreement which is the subject of the order of court, has been satisfied by the tender of the cheque in payment of the indebtedness.

37. It is significant to point out that in the founding affidavit a tender is made to make out the cheque to Maseko's attorneys of record instead of to him if, that would be so desired. However, it appears that there is a conflict between Maseko and his attorneys of record in this ground. That dispute remains between Maseko and his attorneys of record and is not for this Court to make arrangements in this application as to how payment should be effected by Maseko to his own attorneys.

38. In the light of the clear dispute between the two parties on the one hand and the instruction to the Sheriff to execute the warrant at any time, it was necessary to bring the application on an urgent basis. The written execution was issued on 8 July 2002 and there was an attempt to attach the applicant's bank account.

39. It is reasonable to infer that it has been Maseko's strategy or belief to obtain the money through execution. Therefore the applicant or the union had no other alternative but to approach the court on an *interim* basis.

40. The relief sought by the union was declaratory in nature.

1. 41. I therefore make the following order:

1. It is declared that the written execution issued under case number J 1027/02 on 8 July 2002 is of no force and effect.

2. The applicant has satisfied its indebtedness to the respondent as reflected in paragraph 1.2 of the memorandum of agreement dated 14 June 2002. First respondent has no claim in law to that sum.

3. The respondents are interdicted and restrained from taking any steps to enforce the memorandum of agreement in order of court dated 14 June 2002 under case number J1027/02 or by either instructing the sheriff to act under the written issued on 8 July 2002 or by issuing a fresh writ or otherwise.

4. The first respondent is ordered to pay the costs of the application.

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E. Revelas